UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COFFMAN SPECIALTIES, INC.

and **Case 28–CA–223779**

VICTOR HERNANDEZ, AN INDIVIDUAL

Nestor M. Zarate-Mancilla, Esq.
for the General Counsel
Kerry Martin, Esq.
for the Respondent

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This case was tried on February 20-21, 2019, in Phoenix, Arizona. The General Counsel's complaint alleges that Coffman Specialties, Inc. ("Respondent") violated Section 8(a)(1) and (3) of the National Labor Relations Act ("the Act") when it laid off and/or discharged Victor Hernandez, a Teamster driver, on around July 11, 2018, because he engaged in protected concerted activity by raising concerns about Respondent's vehicles and working hours and engaged in protected concerted and union activity by asserting certain contractual rights.[2]

Although Respondent is bound to a multi-employer collective-bargaining agreement with the Teamsters when it performs work in southern California, it is not bound to an agreement when it performs work in Arizona. In June, Respondent asked the Teamsters in southern California to refer qualified truck drivers to work on a freeway construction project in Phoenix, Arizona. Respondent stated it would pay the southern California drivers their prevailing wages and benefits to compensate them for traveling and working out of state. In late June, the Teamsters dispatched 9 drivers, including Hernandez.

Hernandez worked for Respondent in Phoenix during the weeks of June 24 and July 8. On July 10 and 11, Hernandez sent emails to his Teamsters local and Respondent's corporate office manager, alleging safety issues, non-compliance with federal transportation regulations, and harassment. He also sent emails asking his union for a copy of the applicable collective-bargaining agreement, in part, because he wanted to determine what his lodging and per diem was while working in Arizona. At the time, Hernandez was assigned to share a hotel room with Ray Parra, a non-union driver. This upset Hernandez. On July 11, the two had a verbal confrontation and Hernandez allegedly threatened Parra. That day, Parra reported the incident to Respondent's foreman, Larri Nolan, who then spoke to Hernandez. Hernandez complained that his room was a "union" room, and he should not have to share it with a non-union driver. Nolan advised Hernandez the company paid for the rooms, not the union, and there were no "union" and "non-union"

[1] Abbreviations in this decision are as follows: "Jt. Exh." for Joint Exhibits; "Tr." for transcript; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits; and "GC Br." for General Counsel's brief.
[2] All dates refer to 2018, unless otherwise stated.

rooms. Hernandez alleges that Nolan also stated the Teamsters did not have any power in Arizona, that there was no union in Arizona, and the laws are different in Arizona. Following this conversation, Nolan told Hernandez he was no longer needed on the project, and, on July 12, Nolan drove Hernandez back to California. Hernandez has not worked for Respondent since.

The complaint alleges Respondent violated Section 8(a)(1) and (3) of the Act when it laid off and/or discharged Hernandez because he: (1) concertedly complained about Respondent's vehicles and working hours, and (2) claimed the right to per diem, the right to refuse work under dangerous circumstances, and the right to equal employment opportunity, all of which relate to the multi-employer agreement covering Respondent when it performs work in southern California. The complaint further alleges that Nolan's statements to Hernandez violated Section 8(a)(1) of the Act because they indicated to employees that it would be futile for them to support the Teamsters. There is no allegation that Respondent violated the Act when it failed or refused to recall or rehire Hernandez.

The primary issue is whether Hernandez was engaged in protected concerted activity under *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822 (1984), and *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2nd Cir. 1967). Under *Interboro* and *City Disposal*, an individual's assertion of a right *grounded in a collective-bargaining agreement* is protected concerted activity--even where the individual is acting alone--if the employee honestly and reasonably (even if mistakenly) invokes rights that have been collectively bargained, and the individual's statements or actions are reasonably directed toward enforcement of those collectively bargained rights.

At the hearing, Hernandez acknowledged that he was not familiar with the multi-employer agreement referred to in the complaint, and he was not relying upon it, or *any* particular document, when he asserted these alleged rights. Thereafter, Counsel for the General Counsel amended the complaint and now argues Hernandez was still entitled to the Act's protection because he reasonably believed that, as a Teamster referred by his union to work for Respondent, he was covered under some sort of a collective-bargaining agreement.[3]

For the reasons stated below, I reject these arguments and find the General Counsel has failed to establish any of the alleged violations. I, therefore, recommend that the complaint, as amended, be dismissed in its entirety.

STATEMENT OF THE CASE

On July 16, Hernandez filed the unfair labor practice charge in this case against Respondent. On October 23, the Regional Director for Region 28, on behalf of the General Counsel of the National Labor Relations Board, issued a complaint alleging that Respondent violated the Act. On November 9, Respondent filed its answer denying the allegations.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally.[4] Respondent and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record,

[3] After Hernandez testified he was not referring to any particular document when he raised these concerns, Counsel for General Counsel orally amended the complaint to allege these rights Hernandez asserted related to the multi-employer agreement "and/or another collective-bargaining agreement Hernandez believed governed his terms and conditions of employment." (Tr. 263-268).

[4] Counsel for General Counsel subpoenaed Respondent's custodian of records to produce certain documents, and Respondent filed a timely petition to revoke portions of that subpoena. (R Exh. 1 and 2). I orally granted in part, and denied in part, the petition to revoke the subpoena for the reasons stated on the record. (Tr. 14-29).

including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following findings, conclusions of law, and recommended order.

FINDINGS OF FACT[5]

A. Jurisdiction

Respondent is a general contractor in the construction industry doing public and governmental construction. It is a corporation based out of San Diego, California, with an office and place of business in Scottsdale, Arizona. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the foregoing, I find this dispute affects commerce and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

B. Alleged Unfair Labor Practices

1. *Background*

Respondent performs concrete construction work in California and Arizona. It is bound to the Southern California Master Agreement between the Southern California General Contractors and Teamsters Joint Council #42 and Teamsters Local Union #87, dated July 1, 2016 to June 30, 2019 ("Master Agreement"), which, by its terms, only applies to work performed in southern California. (Jt. Exh. 1). As stated, Respondent has no contract with the Teamsters covering work performed in Arizona. The record does not reflect if Respondent has collective-bargaining agreement(s) with any union in Arizona.

In 2018, Respondent was the contractor handling the transportation of concrete and other materials for a freeway construction project in Phoenix, Arizona, referred to as the Connect 202 Project. In June, Respondent did not have enough drivers in Arizona licensed to drive a certain type of truck needed for the project, so it submitted a request to the Teamsters in southern California for properly licensed drivers who were willing to travel to and work in Arizona. In late June, the Teamsters dispatched 9 of its California drivers to work for Respondent on this project. (Tr. 107-108) (GC Exhs. 4 and 5).

Victor Hernandez was one of the Teamsters dispatched. Hernandez lives in Rosemead, California and is a member of Teamsters Local Union No. 986, which is in Covina, California. He has a Class A commercial driver's license and over 30 years of driving experience. This was Hernandez's first time working for Respondent.

Hernandez reported for work on around June 22. That day, he and another Teamster were assigned by foreman Larri Nelson, who is also a Teamster, to drive a dump truck from Victorville, California to

[5] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as being in conflict with credited evidence, or because it was incredible and unworthy of belief.

Respondent's yard in Phoenix.[6] Hernandez and the other Teamster drove the truck and stayed overnight in Phoenix.[7] They returned to California a day or two later via the company van.[8]

Nolan later drove Hernandez and two other Teamsters from southern California back to Phoenix to start work. During the van ride, Nolan explained that since Arizona is a right-to-work state, the labor laws are different than they are in California, and employees only were paid overtime after working 40 hours (as opposed to daily overtime after 8 hours, which was the law in California). He also explained the Teamster drivers from southern California would receive their prevailing wage and benefit rates, as an incentive for traveling to and working in Arizona. (Tr. 147-148; 328). Nolan never mentioned the Master Agreement, or its (in)applicability to them while working in Arizona. (Tr. 148).

On June 25, Nolan provided Hernandez with Respondent's California employee orientation manual. (R. Exh. 3). Respondent has a separate manual given to employees in Arizona which contains information regarding employee health insurance and non-California specific regulations. Hernandez received the California manual because he was hired and on-boarded in California. (Tr. 277-278). The manual contains various policies, including those addressing safety and equal employment opportunity. The safety policies repeatedly state that employees report unsafe or defective equipment to their supervisors immediately. (R Exh. 3, pg. 0008, 0009, 00012, 0013, 0020). The equal employment opportunity policy sets forth a complaint procedure and identifies Respondent's Safety Manger, Steve Rodgers, as the designated Equal Employment Opportunity Officer. (R Exh. 4, pg. 0051). Hernandez signed a form acknowledging that he received the manual, had the opportunity to ask questions about it, and agreed to abide by its contents. (Tr. 330-331) (GC Exh. 2, pg. 11)).[9]

2. *Lodging and Sharing Hotel Rooms*

Hernandez worked on June 25, 26, 28, 29, and 30; he was off the week of July 1; and he returned and worked on July 8 and 11. (GC Exh. 4 and 5). Hernandez and the other truck drivers primarily worked at night and slept during the day. All of Respondent's out-of-town drivers stayed at the Comfort Inn hotel in Phoenix, and Respondent paid for their rooms. Respondent would assign two drivers per room (with

[6] Hernandez first approached Nolan about working for Respondent in April. Nolan took Hernandez's contact information and told him to wait until Respondent's project started in Arizona. (Tr. 108-109).

[7] Hernandez testified the truck they drove from Victorville had no inspection reports or logs in the truck, so he did not know what the prior driver did with the truck or how the truck was being operated. And while Hernandez testified he was not satisfied with the safety paperwork in the truck, he drove it to Phoenix "as a favor" to Nolan, and he later told Nolan about the lack of paperwork and issues with the steering and brakes. (Tr. 204-205). Nolan was not questioned about this alleged conversation. Hernandez did not complete any paperwork regarding these issues. (Tr. 205).

On June 23, Hernandez sent an email to CDL Consultants (info@cdlconsultants.com), which, according to its website (www.cdlconsultant.com/about), is a company with "a team of specialists who provide safety and compliance services to motor carriers and professional drivers." Hernandez testified he understood CDL Consultants helped employees with safety concerns, such as Department of Transportation ("DOT") violations, and also investigated complaints. (Tr. 172).

In this email, Hernandez stated he is a member of the Teamsters working under a contract that requires contractors to perform (pre-hire) drug tests and maintain service logs and vehicle inspection reports. He then claimed contractors do not comply with these requirements, and the union refuses to police or enforce them. He asked CDL Consultants for assistance, citing to safety concerns. At the end of his email, he stated he works for Respondent and another company, and Respondent was not performing (pre-hire) drug tests or maintaining driver logs, which he believed presented a safety issue. (GC Exh. 7). Hernandez did not receive a response to this email. He also did not copy or forward the email to Respondent or the Teamsters. (Tr. 200).

[8] On the weekends and during breaks, Respondent transported drivers back to southern California in a company van.

[9] Hernandez signed the form but testified he did not read it or agree with it. (Tr. 250).

two beds) whenever possible. (Tr. 141-142). During the week of June 24, Hernandez roomed with Nolan. The week of July 8, Hernandez roomed with Ray Parra, a non-union driver. (GC Exh. 2, pg. 23).

3. *Inspection Reports*

Hernandez drove a Super 10 truck, which is a 10-wheel dump truck with a bed and drop axles. (Tr. 107; 201). As a driver, Hernandez was required to perform daily pre- and post-trip inspections of his truck and then complete and submit a vehicle inspection report noting any defects. A mechanic or maintenance employee reviewed the reports and investigated any reported defects, usually within 48 hours. (Tr. 300; 309-310). If the defect was minor, it was addressed when time permitted, but usually during the day, while the drivers were sleeping. If the defect was serious, the truck was pulled out of service until the necessary repairs were completed. (Tr. 300; 305). After the defects were addressed, the responsible mechanic or maintenance employee would sign off on the report to confirm the truck was ready for use. (Tr. 310).

On June 25, at 6:00 a.m., Hernandez completed an inspection report for Tractor Truck No. 560, in which he noted the left rear turn signal was out and the strong arm would not go up. (R Exh. 6, pg. 0694). The Super 10 trucks have a fourth axle, referred to as a "dropdown axle," that is lowered when the truck is carrying above a certain weight. The strong arm is used to raise or lower the axle. (Tr. 304).[10] Mechanic Willie Stills inspected and later signed off on the truck. (Tr. 303). On June 25, at 8:00 p.m., Hernandez completed an inspection report for Tractor Truck No. 565, in which he noted the brakes were out of adjustment. (R Exh. 6, pg. 0695). Stills inspected and later signed off on the truck. On July 11, at 4:30 a.m., Hernandez completed an inspection report for Tractor Truck No. 580, in which he noted the clutch and brakes were out of adjustment, and there was an issue with the air conditioning. (R Exh. 6, pg. 0696). Maintenance employee Joe Arnaldi inspected and later signed off on the truck. (Tr. 304).

4. *Non-Hauling Days*

On the days the drivers hauled concrete, they usually worked between 10-14 hours. (GC Exhs. 4-5). There was no hauling work for the drivers on July 9 and 10. On days there was no concrete to haul, Respondent gave the drivers the option of cleaning their trucks and getting paid for 8 hours, or not cleaning and not getting paid. (Tr. 112). It is unclear when but there was at least one day Hernandez opted not to clean his truck and was not paid. (Tr. 113). On July 10, all the drivers, except for Hernandez, were paid for 8 hours. (GC Exh. 4, p. 0310). The July 9 timesheet was not offered into evidence.

5. *July 10 and 11 Emails*

As stated, during the week of July 8, Hernandez was assigned to share a hotel room with Ray Parra, a non-union driver. According to Hernandez, Parra was unfriendly and would have people come and drink beer with him in the room while Hernandez was trying to sleep. On Tuesday, July 10, Hernandez asked Parra if he was paying for the hotel room, and Parra stated he did not pay for the room, "the union people" did. Based on Parra's response, Hernandez believed that union per diem paid for their room, and he did not understand why he, as a union member, had to share the room that was paid for out of the union per diem, without any choice in the matter. (Tr. 174-175).[11]

Later that same day, Hernandez sent several emails to Teamsters Local Union No. 986 and to Cyndi Sargent, Respondent's officer manager in San Diego. (Tr. 175). At 3:55 p.m., he sent his first email just to Local No. 986, with the subject line "Contract." (GC Exh. 8). In this email, Hernandez identified himself as working for Respondent as a commercial truck driver. He asked for a copy of the agreement and any

[10] Steve Rodgers testified the dropdown axle must always be down on this truck because of its weight. (Tr. 302).
[11] The record establishes there was no union per diem on this project. (Tr. 287-288).

side agreements applicable to him. He stated Respondent was having them travel from state-to-state, working under different state laws--some of which do not allow overtime. He asked what the agreement was, and then asked whether there was an agreement. He stated he was dispatched out of California and asked if his dispatch was only good for this Arizona job.

About 30 minutes later, at 4:24 p.m., Hernandez sent an email to Sargent, with the subject line "Work." (GC Exh. 2, pg. 24). In this email, he identified himself as a new employee working in Phoenix, and that he is from California and a member of the Teamsters. He stated he has had to operate trucks with "many" safety issues, such as no brakes, no low-air warnings, hydraulic leaks, and bad tires. He also stated the company was not complying with the [Federal Motor Carrier Safety Administration ("FMCSA") and U.S. Department of Transportation ("DOT")] regulations concerning driver logs and hours of service requirements, and that he was being encouraged to drive at unsafe speeds. He asked to be transferred to a safer work location where his skills and experience could be used. He pointed out that he has a Class A commercial driver's license with all the endorsements and certifications to operate heavy equipment. He concluded by asking Sargent to "please consider my safety and my concerns."

About 30 minutes after that, at 4:56 p.m., Hernandez sent an email to Local No. 986, and copied Sargent, with the subject line "Pier dem (sic.)." (GC Exh. 2, pg. 25). In this email, he asked his union how per diem worked for Teamsters working for the company while they are out of town. He also asked if there was an agreement. He wanted to know how much the company paid and how much he, as a member of the Teamsters, paid for lodging.

At 6:27 p.m., Hernandez sent another email to Local No. 986, and again copied Sargent, with the subject line "Retaliation." (GC Exh. 2, pg. 26). In this email, Hernandez complained about Local No. 986 and its dispatcher Gene Brewer, and how they failed to represent him over the years when he raised his safety concerns. At the end of the email, Hernandez claimed that Nolan "violated Teamsters agreement and DOT, FMCR for hours of service" and had "Teamsters drive unsafe equipment" and "will cater to non union driver[s] and allow them to drive safer equipment" and "use non[-]union employees to harass and hassle Teamsters[.]"[12]

At 8:05 p.m., Hernandez sent yet another email to Local No. 986, and again copied Sargent, with the subject line "Retaliation." (GC Exh. 2, pg. 27). In this email, he stated that he had been texting Nolan asking if there was any work that day and Nolan did not respond. Hernandez claimed that Nolan was having all the non-union truck drivers working while he was sitting there and not getting paid, and that he wanted to be paid for the "lost days." He concluded by asking the union executive board to investigate this matter, because he believed Brewer would do nothing about it.

On Wednesday, July 11, at 3:59 p.m., Hernandez sent an email to Sargent, and copied Local No. 986, with the subject line "Pier dem (sic.)." (GC Exh. 2, pg. 28). In this email, Hernandez reported that he was sharing a hotel room with a non-union driver who told him the union was paying the cost of the room. Hernandez believed this was both "uncomfortable" and "unfair," and he asked for clarification. He then went on to state that some of the non-union employees were hostile towards the union truck drivers, specifically stating that they yelled and cursed, which he personally found to be "annoying and hostile." Hernandez then asked if he could be assigned a private hotel room. He offered to pay any difference in cost between what was covered by per diem and the cost of the room, by having it deducted from his paycheck. He concluded by again asking for a transfer, claiming that Nolan was not concerned about safety.

[12] Hernandez did not provide any explanation--in his email or at the hearing--about what he meant when he wrote that Respondent catered to non-union drivers or allowed them to drive safer equipment, or how Respondent used non-union employees to harass and hassle Teamsters.

Hernandez did not show or copy any other employee on these emails. (Tr. 231-232).

6. *July 11 Confrontation*

On July 11, at around 9 p.m., Ray Parra approached Nolan at the jobsite and reported that Hernandez had a big knife and was sharpening it in the room and telling Parra that he does not want him in the room. Parra also said Hernandez locked him out of their room stating, "I don't know where you're sleeping tonight, but you're not sleeping in the room." (Tr. 139).[13] Immediately after speaking with Parra, Nolan went to speak to Hernandez. He asked Hernandez to come over, so they could talk. Hernandez testified he was scared for his job, so he asked if there was going to be any discipline given out. Nolan again asked him to just come over and talk. Hernandez stated that if discipline was going to be given out, he wanted to have Greg Sealey, another Teamster, present as a witness. Nolan allowed Sealey to be present. Kraig Smith II, who is Nolan's nephew, as well as a Teamster driver, was nearby and followed them as they went to talk. (Tr. 178-179) (GC Exh. 4). The record is unclear about what exactly was said.

According to Nolan, he asked Hernandez what happened with Parra, and Hernandez responded the hotel room was a "union" room and he did not want to stay in the room with Parra. Nolan told Hernandez the company paid for the rooms, not the union, and there were not "union" and "non-union" rooms. (Tr. 135; 141). Hernandez continued to insist his was a "union" room and he did not want to share it with Parra. Hernandez was up into Nolan's face, pointing his finger, and yelling and being belligerent. (Tr. 141-142).

According to Hernandez, there was a discussion about per diem, and he told Nolan that they (Teamsters) should not have to pay for non-union people's hotel rooms if it was out of their per diem. (Tr. 233). Nolan allegedly replied, "[T]here is no union in Arizona. They have no power. The Union has no rights in Arizona, that the laws are different in Arizona, and that [you] should just be thankful [you] got a job." (Tr. 179). At the hearing, Nolan confirmed telling Hernandez the laws were different in Arizona; the Teamsters did not have a contract with Respondent in Arizona; and there was no union in Arizona. But he denied stating the Teamsters had no power there. (Tr. 120-121; 328). As discussed below, I credit Nolan over Hernandez.

At some point during this exchange, Smith II spoke up and asked Hernandez if he could "try to be more respectful." Hernandez then asked Nolan: "Who is he? Is he a foreman? Am I working for him?" And Smith II responded, "I'm a man and you should act like a man. That's all." Hernandez looked at him and said, "Okay, whatever." As Hernandez walked away, Smith II, who is a Jehovah's witness, said, "I'm going to pray for you." Hernandez, who is a Christian, replied, "That's an insult. Don't you pray for me." (Tr. 180). At the hearing, Nolan did not recall these statements but acknowledged it got heated between Smith II and Hernandez, and he tried to get in the middle because he did not want it to turn into a physical confrontation. (Tr. 143). According to Hernandez, Nolan later told him, "You are done here." "You're unfit to be on my jobsite." and "Be ready to go home in the morning." (Tr. 180-181). Nolan denied telling Hernandez he was unfit. (Tr. 121-122). Again, I credit Nolan.

That evening, Nolan called Respondent's Safety Manager Steve Rodgers to tell him what Parra reported about Hernandez. They also discussed that, earlier in the week, Respondent's project paving

[13] Parra was not called to testify. Hernandez was not asked -- and, therefore, did not testify -- about having or sharpening a knife in Parra's presence or locking him out of their hotel room, which is puzzling because he was the only witness at the hearing who had personal knowledge of these alleged exchanges. Instead, Hernandez testified that on July 11, Parra came up to him at the yard and began to "badmouth" the IBEW, which he knew Hernandez had been a member of in the past. Hernandez responded to Parra that "if I pay for your room, why don't you ask [Nolan] if he could send you somewhere else?" Parra then left to talk to Nolan. (Tr. 177-178). I do not credit Hernandez.

manager informed Nolan that fewer drivers would be needed, starting on Thursday or Friday of that week, because they were getting close to the concrete pour. (Tr. 73-74; 137-138). Based on this information, Nolan and Rodgers decided Hernandez was no longer needed, and Nolan would drive him back to California the next morning. (Tr. 73-74).[14]

Later that night, at 10:51 p.m., Nolan sent Hernandez a text message that he would not be needed for the rest of the week and he would be driven back to California the following morning at 6:30 a.m. Hernandez later texted Nolan asking to stay, that he "need[ed] the money" and he promised to "be nice." (GC Exh. 6, pg. 1-2). Nolan did not respond to the text.

About two hours later, on Thursday, July 12, at 12:43 a.m., Hernandez sent an email to Sargent, with the subject line "Retaliation." (GC Exh. 2, pg. 29). In it, Hernandez reported he was confronted by Nolan and his nephew (Smith II) about sharing a room with a non-union employee. Hernandez stated that Smith accused him of baiting employees and told him that he should act like a man. Hernandez stated he did not know what Smith II was talking about, and Hernandez believed it was their way of retaliating against him for going to Sargent with his safety complaints. He also reported that Nolan told him he was no longer needed, and he was going to be sent back to California.

The following morning, at around 6:30 a.m., Nolan drove Hernandez back to California. No other action was taken against Hernandez for his alleged interaction with Parra at the hotel.

7. *Follow-Up to Emails*

At the hearing, Sargent acknowledged she received Hernandez's emails, but stated she never spoke or otherwise communicated with him. She forwarded his emails to Nolan and Rodgers. (Tr. 90-92). Rodgers testified he believed he received the emails from Sargent late on July 11 or on July 12. (Tr. 301). The only forwarded email in the record is one of Hernandez's two "Retaliation" emails -- and it is unclear from the exhibit which one it was -- that Sargent forwarded to Nolan and Rodgers on July 12, at 6:43 a.m. (GC Exh. 2, pg. 33).

After receiving and reviewing Hernandez's emails, Rodgers called the mechanics and maintenance personnel responsible for the trucks on the Connect 202 Project to confirm they had inspected and addressed the "defects" Hernandez raised in his inspection reports, and to confirm that the trucks did not have the issues he raised in his emails. (Tr. 301). Rodgers also reviewed Hernandez's hours of service logs, as well as other documents, and confirmed he did not work excessive hours and received his required breaks between shifts. (Tr. 297-302).

On July 12, at 9:12 a.m., Rodgers emailed Hernandez, copying Sargent and Nolan, stating:

> Please refrain from e mailing Cyndi Sargent she is the Coffman Specialties Office Manager if you have a problem please contact your Union Representative. Coffman Specialties is NOT

[14] During the investigation of the unfair labor practice charge in this case, Rodgers submitted a position statement. (GC 2, pgs. 1-2). In this statement, Rodgers stated Hernandez was sent home because Nolan spoke to Max Rangel, Respondent's concrete foreman on the project, and Rangel informed Nolan they would need fewer drivers because the work was slowing down. Rodgers makes no mention of Hernandez's alleged incident with Parra at the hotel.

At the hearing, I asked Nolan what caused him to pick Hernandez to be sent home, and he responded, simply, because the paving project manager told him they were going to need fewer drivers starting on Thursday or Friday of that week. Nolan did not refer to the alleged incident with Parra as playing any role in the decision to select Hernandez to be one of those sent home. (Tr. 138).

> signatory with the Teamsters Union in Arizona. We reviewed all of your complaints and verified ALL of our trucks are in good working condition.

(GC Exh. 2, pg. 33).

During the weeks of June 24 and July 8, there were 8-9 Teamster drivers working on the Connect 202 Project. On around July 16, that number dropped to 4-5. (GC Exh. 5).[15] On July 15 and 21, Hernandez sent Nolan texts asking if there was any work *in California*. Nolan responded, stating that he was not needed or there was no work. (GC Exh. 6, pgs. 3-4). Hernandez did not send any texts to expand his inquiry beyond California. (Tr. 197).

On July 25, Hernandez handwrote a grievance against Respondent, alleging that he "was laid off after complaining about equipment safety and after filing a grievance, union activity." (GC Exh. 2, pg. 35).[16] To Hernandez's knowledge, Local No. 986 did "nothing" with this grievance. (Tr. 190).

WITNESS CREDIBILITY

Credibility determinations may rely on a variety of factors, including witness demeanor, the context, quality, and consistency of their testimony, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)). My determinations are incorporated into the findings of fact set forth above.

The witnesses who testified at the hearing were: Hernandez, Nolan, Sargent, and Rodgers. Overall, I found Nolan, Sargent, and Rodgers to be honest, thoughtful, and reliable witnesses who provided consistent, plausible, and logical testimony. They answered the questions asked of them, without evasiveness, deceit, or exaggeration.

Hernandez, on the other hand, was frequently evasive and non-responsive, particularly on cross-examination. (e.g., Tr. 203-204; 208-209; 210-211; 214; 224-225; 249; and 251). His testimony was unsupported, specious, and inconsistent. One example concerned Hernandez's alleged communication with Sargent. Initially, he testified he communicated with Sargent "[j]ust by emails." (Tr. 173). Later, when asked why certain of the concerns he raised at hearing were not mentioned in any of his emails, he testified he did not include them because he had already raised them with Sargent during their telephone conversations, before he sent the emails. (Tr. 217-220). When pressed about these telephone conversations, Hernandez provided vague responses and testified there may have been two Cyndis working at the corporate office, and he could not recall which one he spoke to about these issues. (Tr. 222-224). I find Sargent credibly testified she never spoke to Hernandez. (Tr. 90-92).

Another example concerned why Hernandez did not want to share a hotel room with Parra. Initially, Hernandez claimed it was because Parra informed him the union was paying for the room, and Hernandez did not want to share a room with a non-union driver if union per diem paid for the room. (Tr.

[15] The timesheets for the rest of July and most of August are not in the record. (R. Exh. 5). The record does not reflect the hours of any of the non-union drivers or owner-operators Respondent had on the Connect 202 Project.
[16] Hernandez testified his July 25 grievance was the only one he was "aware of" that he filed. (Tr. 227-228).

174-175). Later, Hernandez testified he did not want to share a room with Parra because Parra was drinking beer with people in their room while Hernandez was sleeping, which "annoy[ed]" Hernandez and interfered with him getting proper rest. (Tr. 216).

At the hearing, Hernandez claimed Respondent violated DOT regulations by requiring him to share a room with Parra. He (incorrectly) stated the DOT required drivers have 8 hours of uninterrupted sleep between shifts, and Respondent was, in effect, "breaking his rest" by allowing Parra to remain in the room. (Tr. 216-217).[17] When asked why none of these issues were mentioned in his emails, Hernandez claimed he had discussed them with Sargent during their telephone conversation(s) -- which, as stated, I do not credit. (Tr. 218-219). Also, when confronted with his pre-hearing affidavit and asked why none of these issues were mentioned in it, Hernandez responded he "didn't think that much of it at the time." (Tr. 220).

Later, after citing these reasons, Hernandez gave what I find to be the real reason he did not want to share a room with Parra, stating, "I prefer to sleep by myself." (Tr. 234).

As for the July 11 exchange, I credit Nolan over Hernandez. Nolan could not recall all of what was said, but I find he testified as fully as his memory would allow, and his recollection was more logical, plausible, and consistent with the other evidence. For example, Nolan and Hernandez both accused the other of being loud and confrontational during their exchange, but later that night when Hernandez texted Nolan asking to stay on the job, he promised that he would "be nice" which suggests Hernandez viewed his own behavior as rude or inappropriate.

LEGAL ANALYSIS

A. *Nolan did not inform employees on July 11 that it would be futile for them to select the Teamsters Local Union No. 986 as their collective-bargaining representative, in violation of Section 8(a)(1) of the Act.*

Paragraphs 5(e) and 7 of the complaint allege that on July 11, Respondent, through Nolan, violated Section 8(a)(1) of the Act when he informed employees that it would be futile for them to select the Teamsters Local Union No. 986 as their collective-bargaining representative. The specific statements alleged to be unlawful are Nolan telling Hernandez the union did not have any power in Arizona, there was no union in Arizona, and the laws were different in Arizona.[18]

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. An employer violates Section 8(a)(1) of the Act by conveying to employees that it would be futile to select or retain a union when it makes statements indicating it will not recognize the union or bargain with it in good faith. See, e.g., *Winkle Bus Co*., 347 NLRB 1203, 1204 (2006) (citing *Ready Mix, Inc*., 337 NLRB 1189, 1190 (2002)); and *Venture Industries*, 330 NLRB 1133, 1133 (2000). The Board has held the legality of any particular statement depends upon its context. *Somerset Welding & Steel, Inc*., 314 NLRB 829, 832 (1994).

As stated, I credit Nolan's recollection, and based on the context and contents of their exchange, I do not find he made statements that reasonably could be interpreted as indicating that it would be futile for Hernandez or the others to select or support Local Union No. 986 as their bargaining representative. First, all four of the individuals involved are members of the Teamsters, including Nolan. Second, as discussed

[17] DOT regulations require that commercial drivers receive 8-10 consecutive hours of off-duty time, not 8-10 hours of uninterrupted sleep, between driving shifts. 49 U.S.C Section 395.3.

[18] The complaint alleges the violation occurred at the Comfort Inn hotel parking lot. Both Nolan and Hernandez testified it happened while the men were out working.

below, Nolan's statements were not in response to any discussion about, or even a suggestion of, any union or protected concerted activity. The reality is that Hernandez did not want to share a hotel room with Parra, and he claimed he should not have to if the union per diem paid for the room. Nolan attempted to correct Hernandez's misconceptions by telling him the company paid for the rooms, not the union, and there were not "union" and "non-union" rooms. But Hernandez persisted, and while explaining to Hernandez why he was not entitled to a "union" room without Parra, Nolan advised him the laws were different in Arizona than in California; the Teamsters did not have a contract with Respondent in Arizona; and there was no union in Arizona. Under the circumstances, I find that these were factually accurate statements in response to Hernandez's incorrect assertions about "union" lodging and per diem, as opposed to threats or coercive statements that there would be no union or no union contract with Respondent in Arizona. Compare *Smoke House Restaurant*, 347 NLRB 192, 203 (2006); *Eldorado Inc*., 335 NLRB 952, 953 (2001); *Concrete Co*., 336 NLRB 1311, 1316 (2001).

In light of the foregoing, I find that Nolan's statements did not violate Section 8(a)(1) of the Act. I, therefore, recommend dismissing this allegation.

B. *Respondent did not layoff or discharge Hernandez because he concertedly raised safety concerns about Respondent's vehicles and working hours, in violation of Section 8(a)(1) of the Act.*

Paragraphs 5(b), 6(a), 6(b), and 7 of the complaint collectively allege that Respondent laid off and/or discharged Hernandez, in violation of Section 8(a)(1) of the Act, because he concertedly complained to Respondent on about July 10 regarding wages, hours, and working conditions of Respondent's employees by raising safety concerns about Respondent's vehicles and working hours. Section 7 of the Act protects the right of employees to engage in "concerted activity" for the purpose of collective bargaining or other "mutual aid or protection." Concerted activity includes activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). However, concerted activity does not include griping or activities of a purely personal nature that do not envision group action. See *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3 (2019) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)); *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). See also *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1 (2019) (individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun). The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014).

When assessing the lawfulness of an adverse employment action, which turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). Under *Wright Line*, the General Counsel has the burden of persuading by a preponderance of the evidence that statutorily protected conduct was a motivating factor for the employer's adverse employment action. To prove this, the General Counsel has the burden of proving the employee engaged in protected activity, the employer had knowledge of that activity, and there is evidence of employer animus. See *Allstate Power Vac., Inc*., 357 NLRB 344, 346 (2011) (citing *Willamette Industries*, 341 NLRB 560, 562 (2004)); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010). Animus

can be established through direct evidence or inferred from circumstantial evidence. See *Medic One, Inc*., 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation.").

If the General Counsel establishes these factors, the burden shifts to the employer to show that it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. An employer cannot simply present a legitimate reason for its action; rather, it must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct. See *Bruce Packing Co*., 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015); *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007); *W. F. Bolin Co*., 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996)).

In his post-hearing brief, Counsel for General Counsel does not specify how Hernandez "concertedly" complained about the safety of Respondent's vehicles and working hours on about July 10. Instead, he vaguely asserts Hernandez was engaged in union and protected concerted activities "through his various statements about the Union and Respondent's non-Union employees, his copying the Union on his communications with Respondent, and his attempt to assert rights he believed he had under the collective-bargaining agreement ..." (GC Br. 23). As discussed below, this assertion about Hernandez's protected activity is an expansion of the specific alleged activity referred to in the amended complaint.

Based upon my review of the record, Hernandez sent or copied Respondent on three emails on about July 10, in which he mentioned the safety of Respondent's vehicles and/or working hours: his 4:24 p.m. "Work" email to Sargent, his 6:27 p.m. "Retaliation" email to Local No. 986 (copying Sargent), and his 8:05 p.m. "Retaliation" email to Local No. 986 (copying Sargent).

In his 4:24 p.m. "Work" email, Hernandez claimed he has to operate trucks with "many" safety issues.[19] He also stated the company is not in compliance with federal regulations regarding driver logs and hours of service requirements, and that he was being encouraged to drive at unsafe speeds. He requested to be transferred to a safer location where "my skills and experience" could be used. He concluded the email by stating, "please consider my safety and my concerns." In the 6:27 p.m. "Retaliation" email, Hernandez stated that "I'm gonna make my safety concern known" and then he alleged Nolan was violating DOT and FMCSA regulations concerning hours of service requirements, and that Teamster drivers are required to operate unsafe equipment whereas non-union drivers are not. He provided no details or examples regarding any of these accusations. In his 8:05 p.m. "Retaliation" email, Hernandez claimed Nolan was having all the non-union truck drivers working while he was sitting there and not getting paid, and that he wanted to be paid for his lost days.

[19] In reviewing the evidence, I have serious concerns about the validity and good-faith nature of Hernandez's complaints about the safety of Respondent's vehicles. As stated, under Respondent's safety policies, employees are required to report defects in equipment to their supervisors immediately. There is no evidence he raised these alleged safety issues with Nolan, Rodgers, or anyone at the jobsite or in the yard. Drivers complete daily inspection reports. Those reports are given to the mechanics and maintenance personnel to inspect and, if necessary, repair the noted defects. Logically, if there is a defect that poses a safety risk, the first step should be to note it on the daily inspection reports. Hernandez never raised hydraulic leaks, low-air warnings, or bad tires in any of his inspection reports. As for brakes, Hernandez simply reported that his brakes were "out of adjustment." Brakes that are out of adjustment is not the same as having "no brakes." Finally, Rodgers testified the defects Hernandez raised in his inspection reports were all minor and all promptly addressed by mechanics or maintenance personnel. (Tr. 76-77).

Hernandez did not discuss or share these emails with any other employee. There is no evidence he was acting with or on behalf of any other employee when he prepared or sent the emails; nor is there evidence or reason to infer that his complaints touched on matters of common concern. Indeed, the record does not indicate that any other employee raised these concerns with Respondent, or even that employees discussed these matters amongst themselves. Finally, nothing in these emails, or the surrounding circumstances, suggests Hernandez was seeking to initiate or induce any collective action. As such, I find Hernandez was not engaged in concerted activity.

I further find Hernandez's aim or goal with this conduct was not to collectively improve terms and conditions of employment or otherwise improve their lot as employees. Rather, he was focused on himself and seeking action that would benefit him. This is evident from the emails he sent. His 4:24 p.m. "Work" email addressed *his* safety, *his* skills and experience, and *his* desire to be reassigned. His 6:27 p.m. "Retaliation" email stated *he* was making *his* safety concerns known. His 8:05 p.m. "Retaliation" email was a demand that *he* be paid for hours *he* was not assigned to work.

In light of the foregoing, I find Hernandez was not engaged in protected concerted activity.[20]

Furthermore, even if, as the General Counsel contends, Hernandez had engaged in statutorily protected activity, and Nolan or Rodgers knew about this conduct prior to making the decision to send him home, I find there is no evidence of employer animus. Rodgers testified Respondent takes safety and compliance with DOT requirements very seriously. As soon as he learned about Hernandez's emails, Rodgers immediately investigated and confirmed that maintenance personnel investigated and addressed any defects Hernandez raised in his inspection reports, and further confirmed the trucks he drove did not have any of the other issues Hernandez raised in his emails. Rodgers also reviewed Hernandez's hours of service logs, as well as other documents, and confirmed he received his required breaks between shifts. He then emailed Hernandez with his conclusions. There also is no evidence of animus concerning Hernandez's various statements about the Union and Respondent's non-union employees, his copying the Union on his communications with Respondent, and/or his attempts to assert rights he believed he had under a collective-bargaining agreement.

The General Counsel contends animus should be inferred based on timing. Animus may be inferred when there is not a legitimate, alternative explanation for the timing of the adverse action. However, I find Respondent has a legitimate, alternative explanation for the timing of Hernandez's layoff/discharge—it needed fewer drivers. It is unrebutted that Respondent's project paving manager informed Nolan earlier that week that it needed fewer drivers starting that Thursday or Friday, because of the upcoming pour. The payroll records for the following week confirm the number of Teamster drivers on the project went from 8-9 to 4-5. I find this evidence also undermines any claim of pretext.

[20] Under the "inherently concerted" doctrine, the Board has held that employee discussions—specifically about wages and job security--are concerted, and protected, regardless of whether they are engaged in with the express object of inducing group action. See *Alternative Energy Applications*, Inc., 361 NLRB 1203, 1206 fn. 10 (2014) (wages are a "vital term and condition of employment," the "grist on which concerted activity feeds," and such discussions are often preliminary to organizing or other action for mutual aid or protection) (citing to *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992); *Scientific-Atlanta, Inc*., 278 NLRB 622, 624-625 (1986)); and *Hoodview Vending Co*., 362 NLRB 690, fn. 1 (2015), incorporating by reference 359 NLRB 355 (2012) (finding discussions of wages inherently concerted "applies with equal force to conversations about job security.") The Board has not expanded -- and, in fact, has recently declined to examine and address whether this doctrine should be expanded -- to include discussions about safety. See *North West Rural Electric Cooperative*, 366 NLRB No. 132, slip op. at 1, fn. 1 (2018) (Board adopted judge's finding that employee's Facebook posts about safety were concerted activity, and, therefore, found it unnecessary to address judge's alternate conclusion that posts were inherently concerted). Any expansion of this doctrine is better suited for the Board itself.

For these reasons, I find the General Counsel failed to meet his burden of establishing that Hernandez was laid off and/or discharged in violation of the Section 8(a)(1) of the Act, because he concertedly complained on about July 10 regarding wages, hours, and working conditions of Respondent's employees by raising safety concerns or concerns about working/break hours.[21] The same holds true if, as the General Counsel now alleges, the alleged activity included making related statements, sending the emails, and/or copying his union on those emails. I, therefore, recommend dismissing this allegation.

C. *Respondent did not layoff and/or discharge Hernandez because he asserted contractual rights, in violation of Section 8(a)(1) and (3) of the Act.*

Paragraphs 5(c), 5(d), 6(a), 6(c), and 8 of the complaint originally alleged that Respondent violated Section 8(a)(1) and (3) of the Act when he laid off and/or discharged Hernandez because he claimed the right to per diem, the right to refuse work under dangerous circumstances, and the right to equal employment opportunity, which relate to the Master Agreement. The General Counsel relies upon the *Interboro* doctrine, approved by the Supreme Court in *NLRB v. City Disposal Systems*, to establish this violation.[22] In *Interboro Contractors*, supra, the Board held an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes "concerted activity" protected by Section 7 of the Act. In approving this interpretation of the Act, the Supreme Court in *City Disposal* held:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process--beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement--is a single, collective activity. Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees.

NLRB v. City Disposal Systems, 465 U.S. at 831-832 (footnotes omitted).

The Court further held, in agreement with the Board, that an employee need not file a formal written grievance, nor explicitly refer to the collective-bargaining agreement as the basis for his complaint, to be protected under the Act. Moreover, the Court held the employee does not have to be correct in asserting the agreement has been violated for his activity to be protected. Id. As long as the employee's complaint

[21] Hernandez alleges in his emails that Respondent was not complying with certain DOT and FMCSA regulations. The Board has held that an employee acting alone in seeking to enforce statutory rights, and not as a representative of other employees, is not engaged in "concerted activity" under the Act. *Meyers II*, supra at 888.

[22] The General Counsel also cites to *Crown Wrecking Co., Inc*., 222 NLRB 958 (1976), in which the Board adopted the judge's finding that two employees were discharged in violation of Section 8(a)(1) *and* (3) of the Act when they asserted rights under the collective-bargaining agreement. The judge held that, by terminating employees for having invoked what they reasonably and in good faith believed to be their rights under their collective-bargaining contract, the employer thereby also violated Section 8(a)(3) of the Act by discouraging membership in the union. "If an employer, by his actions, leads his employees to believe that they cannot invoke their asserted rights under a contract without being subjected to discharge or the threat of discharge or other reprisal, then such actions will have a predictable tendency to undermine support for the employees' [u]nion." Id. at 962. Although *Interboro* and *City Disposal* deal with protected concerted activity, as opposed to union activity, my analysis and conclusions encompass Hernandez's alleged protected concerted and union activity of asserting contractual rights.

or action is based on a reasonable and honest belief that his rights under the collective-bargaining agreement are being violated, and his statements or actions are reasonably directed toward enforcement of a collectively bargained right, he is entitled to the protection of the Act. *City Disposal*, supra at 837. See also *Tillford Contractors*, 317 NLRB 68, 69 (1995) (holding that the employee must refer to a reasonably perceived violation of the collective bargaining agreement); *Bechtel Power Co*., 277 NLRB 882, 884-85 (1985) ("as long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably-perceived violation of the [CBA], the complaining employee is in the process of enforcing that agreement."). Cf. *Newark Morning Ledger*, 316 NLRB 1268, 1271-1272 (1995)(employee did not have reasonable and honest belief asserting contractual right, but was seeking to unilaterally change the agreed-upon terms for referring substitutes for employment); and *ABF Freight Systems*, 271 NLRB 35, 42-43 (1984) (sheer volume of a driver's complaints -- four times more than any of the other drivers -- and his "highly argumentative" demeanor were indicia that he was not honestly and reasonably asserting a contractual right).

From the outset, there are two flaws with the General Counsel's case. First, Hernandez is alleged to have asserted the right to per diem, the right to refuse work under dangerous circumstances, and the right to equal employment opportunity *under the Master Agreement*.[23] Hernandez, however, admitted at the hearing that he had never seen, and was not familiar with, the Master Agreement. (Tr. 206-207). He, therefore, could not have been relying upon the Master Agreement to assert any of these rights. Second, although Hernandez raised safety concerns, he never refused, or threatened to refuse, work because of dangerous conditions. As such, regardless of whether there was a contractual right to refuse such work, he never attempted to invoke or exercise it.

That leaves his alleged claims for per diem and equal employment opportunity. On the issue of per diem and sharing a hotel room, Hernandez testified he believed he had a contractual right to have his own hotel room. When asked to explain the source of that "right," he testified as follows:

> JUDGE GOLLIN: When you say you have a "right," what are you referring to? Where is that right?
> THE WITNESS: It's like a union it's a union agreement. I'm not sure if it's in the contract. That's why I'm asking in some of the letters what are the -- I was new to the construction as to going out of town. So I wasn't sure of their agreement or any side agreements that they have. But with other union companies, they do have side agreements for lodging. And one of the agreements is, if you want to share your room, you could share your room. If you don't want to, you could either help pay half and stay by yourself. And that's what I was asking. And that's the reason -- Mr. Parra likes to drink. I don't drink. Nothing wrong with him drinking. There's nothing wrong with it, but it's just -- he was breaking my rest.
> Q. BY MR. MARTIN: But you were unaware of any right in Arizona that you could have your own room, true?
> A. I was unaware of anything in Arizona, of any contract or any work rules or laws or anything. I was under the impression that I'm a California employee covered by a national construction contract, and I was being treated as a Teamster working in another state. That's my understanding.
> Q. What national employment contract are you referring to?
> A. As I was -- as my understanding is the -- maybe it's this one [referring to the Master Agreement]. National labor agreement? I don't know -- well, the industry that I'm in now, again, they're similar but they're different. There's a national master freight agreement. We go from state to state such as this as we're doing, and we're covered as we're employees in the

[23] In his post-hearing brief, Counsel for General Counsel does not cite to any provision(s) in the Master Agreement that allegedly provide these rights.

state of California, and our rights are the same as in any other state. But in this -- that's why my mentality and the way I was thinking when I was told to go to Arizona with the Union, that I would be covered and that I have every right that I'm entitled to in California as I would in Arizona.

…

Q. Have you ever seen the national -- this alleged national agreement that may or may not apply to you?

A. I have seen them before. Yes, I have.

Q. Where at, and when?

A. Well, when I worked in -- the freight. I worked in -- I worked for the IBEW. We went from state to state and were covered the same way as we were, as we were in our own local. And I have always worked under them. That's why I was so unfamiliar with when I found out after that -- the way the Teamsters, the construction Teamsters, operate. I was unaware of it.

Q. Now, you mentioned freight. Explain what you mean by working freight.

A. Freight is just a different -- such as construction. It's working on construction site. Freight is picking up -- it's truckloads and stuff like that where we do -- we pick up -- they pick up LTL freight from different carriers. And we combine it in one terminal, and we deliver it to a different job or a different site, different states, different -- it's similar to construction. As construction, we come from one job to another, work for this company and go back to our job and our state and still be a member of our local.

Q. And the work that you were doing -- you weren't doing freight work for Coffman.

A. It could be covered under freight if it chose to, but no, it's not. It's construction

….

Q. And you mentioned that with -- when you were with the IBEW, that you believed you were covered by a national agreement?

A. Yes, I was.

Q. And when were you with the IBEW?

A. From 2003 to 2012, I think. Somewhere around there. '13.

Q. Coffman wasn't a signatory to this purported national agreement, true?

A. I have no idea. I was, I was under the impression, as soon as they dispatched me to Arizona, that I was under that agreement.

(Tr. 234-238).

Later during this line of questioning, I attempted to get clarification from Hernandez:

JUDGE GOLLIN: So sitting here today, you testified already, have you ever seen this document before, Joint Exhibit 1 [the Master Agreement]?

THE WITNESS: Not that I'm aware of, no. Not that one.

JUDGE GOLLIN: Okay, so when you're, when you're writing your emails to Cyndi … Sargent, were you referring to the document that's in front of you [the Master Agreement]?

THE WITNESS: No. No.

JUDGE GOLLIN: What specific documents were you referring to when you sent these emails to Ms. Sargent?

THE WITNESS: It was more my understanding or my misunderstanding, but I was requesting the information so I would be understanding what the agreement was. And that's what I was asking for.

JUDGE GOLLIN: So am I correct in understanding that you were not referring to any particular document when you sent these emails to Ms. Sargent [and] your union?[24]

[24] Page 240, line 4 of the transcript incorrectly has the word "in" as opposed to "and." That error is corrected.

THE WITNESS: No. I was looking for the proper information.

(Tr. 239-240).

Respondent later moved for a directed verdict based, in part, on this testimony. Counsel for General Counsel countered by moving to amend paragraph 5(d) of the complaint to allege that "The claims of Employee Hernandez described above in paragraph 5(c) relate to the agreement and/or another collective bargaining agreement that Hernandez believed governed his terms and conditions of employment." When asked specifically what other agreement Hernandez believed applied, Counsel for General Counsel stated Hernandez believed there was a "national agreement" or some other agreement that covered him whenever he was sent out of California to work in another state. (Tr. 262). At the hearing, and for the reasons stated on the record, I denied the motion for directed verdict, and I granted the motion to amend over Respondent's objection. (Tr. 267-268).[25]

The issues are: (1) whether Hernandez's complaints about per diem/lodging and equal employment opportunity were based on a reasonable and honest belief his contractual rights are being violated; and (2) whether his statements or actions are reasonably directed toward enforcement of a collectively bargained right. *City Disposal*, supra at 837.

Counsel for General Counsel argues that because Respondent requested Hernandez from the Teamsters, hired him out of Respondent's San Diego office after being dispatched by the Teamsters, issued him Respondent's California employee manual instead of the Arizona employee manual, and paid him travel time from California to Arizona and back to California, it is reasonable for an employee, like Hernandez, who has an extensive history as a Teamster driver, to have a good faith belief that his employment would be subject to the terms of *a* collective-bargaining agreement. The General Counsel further argues that the *Interboro* doctrine does not require that an employee have an actual contract from which to cite, and that constricting the doctrine to that minimal level renders the doctrine meaningless.

I reject this argument. Under the *Interboro* doctrine, an employee need not cite to a specific provision in the collective-bargaining agreement, or cite to the agreement at all, but he must assert a right *grounded in a collective-bargaining agreement*, because it is the employee's reliance on the collectively bargained right that makes otherwise individual activity "concerted." The same holds true for any claim that it qualifies as union activity. In *City Disposal*, the Court held that "[a]s long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived *violation of the collective-bargaining agreement*, the complaining employee is engaged *in the process of enforcing that agreement*." 465 U.S. at 840 (emphasis added). An employee cannot reasonably be attempting to enforce a collectively bargained right when he is unaware whether an agreement exists and, if so, what rights it provides. Hernandez testified he did not know whether an agreement existed and the rights it provided, which is why he emailed his union at 3:55

[25] As stated, in his post-hearing brief, Counsel for General Counsel argues Hernandez engaged in union and protected concerted activities, through his various statements about the Union and Respondent's non-Union employees, his copying the Teamsters on his communications with Respondent, and his attempt to assert rights he believed he had under a collective-bargaining agreement covering his terms and conditions of employment by asking for contractual benefits to which he in good faith believed he was entitled. (GC Br. 23). This is a clear expansion from what is alleged in the complaint and the amended complaint. The complaint, as amended, only alleges as his protected concerted and union activity his alleged claims to the right to per diem, the right to refuse work under dangerous circumstances, and the right to equal employment opportunity, which relate to the Master Agreement and/or another collective-bargaining agreement that he believed governed his terms and conditions of employment. There is no assertion, or notice given to Respondent, that it also included his statements about the Teamsters and Respondent's non-union employees or his copying the Teamsters on his communications with Respondent.

p.m. on July 10, asking for a copy of the agreement or side agreement that applied to him when he worked for Respondent in Arizona.

The General Counsel cites to *Omni Commercial Lighting, Inc*., 364 NLRB No. 54 (2016) for support. In *Omni*, Hopkins, an electrician and union member, interviewed and was later hired to work for a lighting contractor. There were three different area collective-bargaining agreements covering various aspects of electrical work: the Master Agreement ("MA"), the Sign Agreement ("SA"), and the Lighting Maintenance Agreement ("LMA"). The MA provided the highest wages and benefits and the LMA provided the lowest wages and benefits. At the time of his interview, Hopkins was working for another contactor and covered under the MA. During his interview, Hopkins stated he wanted to continue working under the MA, and the employer agreed, stating she "would be fine with the maintenance agreement." Thereafter, Hopkins submitted a job application, wherein he reiterated his request for the MA wage rate. After he was hired by Omni, Hopkins performed electrical work like what he performed at his former employer under the MA, and Omni paid him the MA wage rate.

About 2 weeks into his employment, the union business representative told Hopkins that Omni did not currently have an agreement with the union, but they were in the process of negotiating one. He did not reference the MA, or any other contract, in this conversation. Hopkins continued performing the same work at the same (MA) wage rate.

About two months later, Hopkins spoke again with the union business representative and asked why the MA with Omni had not yet been signed, and the union representative did not dispute that the MA was the applicable agreement, replying that he "[knew] what agreement goes in place." In mid-December, Omni informed Hopkins that the company and the union had signed an agreement, but it did not mention that they had agreed to the LMA. Thereafter, Omni continued to pay Hopkins at the same (MA) wage rate but adjusted his benefit contributions to the LMA rates. In June 2014, when Hopkins became aware that he was not receiving the current MA rates, he complained. Omni advised Hopkins that he was covered by the LMA, summarized his wages and benefits, and noted he was already getting paid more than the LMA required. Hopkins continued to challenge this, insisting the parties had executed the wrong agreement. Omni responded by terminating his employment.

In upholding the judge's finding the termination violated Section 8(a)(1) of the Act, the Board held:

> We find that these facts clearly demonstrate that Hopkins held a reasonable and honest belief that the MA was the applicable contract governing his employment with Omni. The facts further establish that when Hopkins learned, months later on June 12, that Omni and the Union had actually executed the LMA, he reasonably believed that Omni and the Union mistakenly executed the wrong contract, as it was the MA rather than the LMA that reflected the wages he was paid, the scope of work he was performing, and the assurances he was given. …. [I]t matters not whether Hopkins' contractual claim was factually correct, but only whether his claim was a reasonable and honest one; that is all that *City Disposal* requires.

Id. at slip op. at 3.

I find *Omni* to be inapposite. First, as the Board held, Hopkins had a reasonable basis for mistakenly believing he was covered under the MA, namely: the employer told him during the interview that it would be "fine" paying him the MA wage rate; the employer, for 9 months, then paid him his MA wage rate and had him perform the same tasks he performed under the MA for his prior employer; when he spoke with the union about contract negotiations and the MA, the business representative stated he "[knew] what agreement goes in place;" and, at no time, did either the employer or the union gave him any indication that any other agreement applied to him. That was not the case here. Respondent nor Local Union No. 986

made any statements or took any action indicating to Hernandez that he was covered under a collective-bargaining agreement when he worked in Arizona. Nolan told Hernandez and the other Teamster drivers from southern California that they would be paid their prevailing wages and benefits *to compensate them for traveling and working out of state*. There never was any mention of a collective-bargaining agreement. Moreover, Hernandez's July 10 emails reflect he was unclear what, if any, agreement applied to him. His 3:55 p.m. email to Local Union No. 986 requests a copy of the agreement or side agreement that applied when he worked in Arizona, and his 4:56 p.m. email about per diem asks whether there was an agreement. He never received any response to these emails. But, during their July 11 exchange, Hernandez acknowledged that Nolan told him Respondent did not have a contract with the Teamsters covering work in Arizona.

Second, Hopkins' statements were reasonably directed at enforcing rights he believed he had under the MA. The employer interpreted them as such, as demonstrated by its response that he was covered under the LMA, not the MA. In contrast, Hernandez's statements were not reasonably directed at enforcing contractual rights, because, as stated, he did not know what rights, if any, he had, which is why he was emailing his union on July 10, asking for a copy of the agreement or side agreement that applied to him while working in Arizona.

The only agreement Hernandez mentioned -- at the hearing, not to Respondent -- was a "national agreement" he worked under when he drove freight for the IBEW between 2003 and 2013. This agreement was never presented or introduced into the record, making it impossible to determine whether Hernandez had a reasonable or honest belief that it provided him with right to per diem, the right to refuse work under dangerous circumstances, and/or the right to equal employment opportunity. However, it is dubious that an agreement covering a different industry (freight versus construction), with a different union (IBEW versus Teamsters), from five years ago, could reasonably be relied upon as providing a contractual basis for asserting these rights in this context. Furthermore, there is nothing in his emails, or his statements on July 11, indicating that Hernandez was asserting/enforcing rights under this national agreement.[26]

Finally, Hernandez testified generally that he had been a Teamster union steward in the past and dealt with grievances and DOT violations. (Tr. 253). Counsel for General Counsel argues this informed his views about what rights he had as a union member, making his assertions in this case reasonable and honest. I reject this argument. First, it was factually undeveloped in the record. There is no evidence about what happened, what he did, and/or what contractual rights he asserted at the time. Presumably, if he was pursuing a grievance, he relied upon and likely referred to a particular collective-bargaining agreement. There is no way to determine, then or now, whether his assertion of a contractual right(s) was reasonable and honest, and/or whether his statements were reasonably directed toward enforcement of those rights.

Overall, I find Hernandez was not engaged in protected concerted or union activity when he sent his emails, made statements about the Teamsters and Respondent's non-union employees, copied the Teamsters on his communications with Respondent, and/or attempted to assert perceived contractual rights.

Additionally, even if Hernandez had engaged in protected concerted and/or union activity, there, again, is no evidence of employer animus. I do not credit Hernandez's testimony about Nolan's alleged unlawful statements during their July 11 exchange. And, as stated, I find the timing of his layoff and/or discharge was due to Respondent's legitimate need to reduce the number of drivers on the project.

[26] I further find Hernandez was not engaged in protected concerted or union activity during his exchange with Nolan on July 11 simply because he raised per diem or lodging in the presence of other employees. Hernandez's statements during this exchange were mere gripes, not a "concerted" complaint made on behalf of, or to induce action by, his co-workers. See *Alstate Maintenance, LLC*, supra, slip op. at 1. Additionally, since he was not reasonably relying upon any collectively bargained rights, I also find he was not engaged in union activity.

Based on the foregoing, I find the General Counsel has failed to establish that Respondent violated Section 8(a)(1) and (3) of the Act when he laid off and/or discharged Hernandez. I, therefore, recommend dismissing this allegation, as amended.

CONCLUSIONS OF LAW

1. Respondent, Coffman Specialties, Inc., is an employer engaged in commerce out of its Phoenix, Arizona facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent did not violate the National Labor Relations Act in any manner alleged in the amended complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[27]

ORDER

The complaint is dismissed.

DATED, WASHINGTON, D.C., APRIL 30, 2019.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."